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780150—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 604

EARL P. HOINESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner presents four questions for determination by this Court (Pet. 6–9; Br. 32–53):

a. Whether the Circuit Court of Appeals for the Ninth Circuit erred when it dismissed his appeal, taken on October 18, 1946, from the District Court's decree of October 14, 1946, on the ground that the District Court's earlier minute order of August 5, 1946, likewise dismissing the libel for lack of jurisdiction, was the final decision from which the appeal should have been taken.

b. Whether the provisions of Section 2 of the Suits in Admiralty Act (Act of March 9, 1920, ch. 95, sec. 2, 41 Stat. 525, 46 U. S. C. 742) concerning the district in

which suits against the United States under that Act shall be brought (Appendix, pp. 7–8) are jurisdictional or constitute venue requirements which may be waived by the United States.

c. Whether the United States is liable (under the Jones Act (Act of March 4, 1915, sec. 20, 38 Stat. 1185, as amended by the Act of June 5, 1920, sec. 33, 41 Stat. 1007, 46 U. S. C. 688), the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, as amended, 46 U. S. C. 741–752), and the War Shipping Administration (Clarification) Act (Act of March 24, 1943, 57 Stat. 45, as amended, 50 U. S. C. App., Supp. V, 1291)) to a member of the crew of a vessel owned and operated by the United States through the War Shipping Administration for an assault committed by a member of the Navy gun crew stationed aboard the vessel, (a) where the United States knew, or should have known, that the particular member of the gun crew was "of violent, aggressive or pugnacious nature," or, alternatively, (b) where the assault is committed in line of duty.

d. Whether the United States is liable, under the Second Seaman's War Risk Insurance Policy (8 Fed. Reg. 3455 *et seq.*) issued pursuant to the Merchant Marine Act, 1936, as amended (Act of June 29, 1936, 49 Stat. 1985, as amended, 46 U. S. C. 1128–1128g, Supp. V, 1128–1128h), for the injuries suffered by petitioner.

The United States believes that the first two questions are appropriate for consideration and decision by this Court, but that the latter two are neither ripe for determination nor properly presented in the current posture of this case.

1. In dismissing petitioner's appeal because his appeal papers stated it to have been taken from the decree of October 14, 1946, rather than from the order of August 5, 1946, although it was timely as to the earlier judgment, the Circuit Court of Appeals appears to have been unduly technical at the expense of substantial justice (R. 47A–48). Cf. R. S. 954, 28 U. S. C. 777; *Miller* v. *Hatfield,* 309 U. S. 1, 2. As Judge Healy points out in his dissent below, *Liberty Mutual Ins. Co.* v. *Pillsbury,* 154 F. 2d 559 (C. C. A. 9), certiorari denied, 329 U. S. 717, upon which the majority relies and which the Government believes to have been correctly decided, involved an appeal taken more than three months from the District Court's initial final order, but within three months from the later formal decree. Here, there was no such attempted extension of the appellant's statutory time to appeal.

2. Whether Section 2 of the Suits in Admiralty Act (Appendix, pp. 7–8) relates to jurisdiction or only to venue, a question not as yet determined by this Court,[1] is a matter of substan-

[1] The corresponding provision of the Tucker Act (28 U. S. C. 762) has been held to be a matter of venue rather than ju-

tial public importance which has occasioned a contrariety of views in the lower courts. The issue is one often faced in government admiralty litigation. Seamen's suits under the statute have become frequent as a result of direct government operation of merchant vessels during the emergency, and when the libelant files in a district other than that of his residence, which is often done, the power of the court to entertain the cause, even with the consent of the Government, is still unclear. The circuit courts of appeal have not spoken, but the Second Circuit has intimated that the provisions of Section 2 may not be jurisdictional in suits *in personam*. *McGhee* v. *United States,* 154 F. 2d 101, 104 (C. C. A. 2). Cf. *Carroll* v. *United States,* 133 F. 2d 690, 692–3 (C. C. A. 2). The admiralty district courts, which have passed upon this point, are sharply divided. Holding the statutory requirements to be jurisdictional, and not waivable, are the instant case (District Court for the Northern District of California, St. Sure, J.) (R. 21, 23–24); *Sawyer* v. *United States,* 66 F. Supp. 271 (S. D. N. Y., Kennedy, J.); *Abbott* v. *United States,* 61 F. Supp. 989, 991 (S. D. N. Y., Knox, J.) (semble, in part); and *Rodinciuc* v. *United States,* 1947 A. M. C. 951 (E. D. Pa., Gane, J.). Of the view that the provisions relate to venue, and therefore may be waived, are *Abbott* v. *United*

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risdiction. *United Staes* v. *Hvoslef*, 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 24.

States, 61 F. Supp. 989, 991–992 (S. D. N. Y., Knox, J.) (semble, in part); *McGhee* v. *United States,* 62 F. Supp. 224 (S. D. N. Y., Bright, J.); and *Metaxas* v. *United States,* 68 F. Supp. 667 (S. D. Calif., Mathes, J.). See also *Haesen* v. *United States,* 66 F. Supp. 759, 760–761 (E. D. N. Y.); *Barnes* v. *United States,* 67 F. Supp. 571, 573 (S. D. N. Y.). In this state of the decisions, we do not oppose the granting of the writ to review this question and to determine to what extent, and in what manner, the requirements of Section 2 may be waived by the United States.

3. The third question presented by the petitioner, concerning the alleged assault by a member of the naval armed guard, can neither be canvassed nor decided apart from the particular facts of the case, which facts neither of the lower courts has found. A full trial was had, much conflicting testimony was given, and the record presents several direct contradictions on material facts. Although the evidence is here in written form, and the Court is empowered to find the facts for itself (*Johnson* v. *United States,* No. 138, this Term, decided February 9, 1948), it would appear preferable in litigation of this character to have the testimony sifted and the facts initially found by the District Court. Such issues of law as may survive a determination of the facts can then be decided, in ordinary course, in the light of the actual circumstances.

4. Proper resolution of petitioner's last ques-

tion, concerning the liability of the United States under the Second Seamen's War Risk Policy for the alleged assault, likewise largely depends upon the facts, which remain to be determined.[2]

For the foregoing reasons, we do not oppose the granting of the writ of certiorari to review the questions pertaining to (a) the propriety of the Circuit Court of Appeals' dismissal of petitioner's appeal, and (b) the nature of the requirements of Section 2 of the Suits in Admiralty Act. We believe, however, that the petition should not be granted with respect to the other questions presented.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

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[2] Petitioner recognizes that the third and fourth questions are linked together, and that he might recover either damages or insurance benefits, but not both. Br. 53–54. Neither of the lower courts passed upon either the third or the fourth questions.

APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. 746, *et seq.*) provide as follows:

SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo

charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.